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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~741~~ 75

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

against

NACIREMA OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Questions Presented

1. Whether the District Judge has power to direct a verdict where there is insufficient evidence to support the claim.

2. Whether there is sufficient evidence in this record to warrant submission to the jury of the issue of the shipowner's right to indemnity against the stevedore, where the shipowner itself has been held liable to the plaintiff because of its independent, affirmative negligence.

Statement

The plaintiff in the main action, a stevedore in the employ of Nacirema Operating Co., was injured on board the Liberty Ship "F. E. Weyerhaeuser" in Boston Har-

bor, when a piece of lumber fell from a shelter erected over the winches at number 1 hatch, and struck him (31, 32*).

There was unanimous agreement among the witnesses that shelters such as the one from which the piece of lumber fell are erected by longshoremen in all harbors of the United States as a protection for the winchmen against the weather. They are temporary structures constructed of ship's dunnage with a tarpaulin roof, the tarpaulin being furnished by the ship or taken from the longshoremen's gearhouse (52, 53). The particular shelter involved in this case, in addition to its tarpaulin roof, had a piece of loose tarpaulin and some pieces of loose lumber thrown on top (51).

It was the testimony of the plaintiff's witnesses that the shelter on the vessel Weyerhaeuser was already there when the ship docked in Boston Harbor (50). Implicit in the jury's verdict in favor of the plaintiff is a finding that such was the fact, and a further finding that the ship had an opportunity to see, and did see, the shelter before the plaintiff's accident and failed to make it secure. For the Court had specifically instructed the jury that the plaintiff could not recover in negligence unless it found that the shelter was in place when the ship docked, and that the ship had an opportunity to see, and did see, the structure and failed to make it secure. The instructions on that point were as follows:

> "Now, if you find from the evidence that the structure, that is, this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence as I have defined it to you, then you could find a verdict for Mr. Connolly.

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* Page references are to Petitioner's Appendix.

But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring a verdict for the ship. * * *

"Going back for a minute to the negligence, in order to find negligence against the ship you would have to find, for instance, that they had an opportunity to see that structure, that they did see it and that they took no steps to make it fast and to keep that wood down there." (118, 119)

There was testimony in the plaintiff's case that shelters erected by longshoremen are taken down by the ship's crew, in every well run ship, as soon as it is made ready for its voyage (70, 71, 73, 75). This testimony was corroborated by the ship's own witnesses (85, 86). The captain of the vessel testified to the ship's responsibility for removing the shelters:

"Q. Just a few more questions, Captain. Assuming that shelters had been erected in New York, and assuming that they had been left on the vessel on its way to Boston, that would have been carelessness on the part of your shipmates, wouldn't it Captain? A. It would be carelessness on the part of myself and the chief mate.

Q. Well, it would be essentially carelessness on the part of the chief mate, wouldn't it. A. No, I would say that I would feel the responsibility very definitely * * *.

Q. Now, Captain, it is the chief mate's responsibility, if there were shelters on this vessel, to see that they were taken down; is that correct? A. I can't pin it down directly to the chief officer. It is all our responsibility." (93, 94)

The chief officer testified that it was his job to see that the shelters were taken down, and that, if the vessel reached Boston with the shelters still up, he would have been derelict in his duty (109).

The vessel had taken on parts of her cargo at Tacoma and Raymond in Washington, and had finished loading at Longview (81, 82). She then sailed to New York where part of her cargo was unloaded by employees of the respondent, Nacirema Operating Co. Inc. (84). The captain testified that there were no deck shelters up when the ship left Longview (83), and that there were no deck shelters standing when the ship entered Boston Harbor (92). He did not remember whether the longshoremen had erected shelters while the ship was being unloaded in New York (92), but the weather was so rough on the voyage from New York to Boston that, in his opinion, it would have been utterly impossible for a piece of loose tarpaulin and loose lumber to remain on the roof of the shelter during that voyage; the wind and the movement of the ship would have shaken them off (90). In that conclusion the chief officer concurred (105).

No one could, or did, testify when the particular shelter involved in this case was erected. From the established custom it could be inferred that it was erected by longshoremen at one of the ports at which the ship docked; but whether it was erected on the west coast or at New York would be a matter of speculation. There is no evidence at all as to when the loose pieces of lumber were thrown on top of the shelter. The inference that they were thrown there by the ship's crew is just as consistent with the evidence as the inference that they were put there by the longshoremen. Under such circumstances, it is the position of the respondent, Nacirema Operating Co., Inc., that the ship failed to produce sufficient evidence to warrant submission of the issue of its right to indemnity to the jury, and that the direction of the verdict by the Court, was, therefore, entirely proper.

Argument

1. THE DISTRICT COURT HAS POWER TO DIRECT A VERDICT WHERE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CLAIM.

There seems to be no room for argument that a District Court has power "to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict". (*Galloway* v. *United States*, 319 U. S. 372, 373.)

2. THERE IS INSUFFICIENT EVIDENCE IN THIS RECORD TO SUPPORT A VERDICT IN FAVOR OF THE VESSEL ON ITS CLAIM FOR INDEMNITY.

The claim for indemnity here is based on two grounds: one, that the stevedore's active negligence was responsible for the plaintiff's accident and that the vessel was merely passively negligent; the other, that the stevedore breached its warranty of workmanlike service in the performance of its contract.

In dealing with the vessel's claim that it is entitled to indemnity at common law, it is not here necessary to argue the validity of the respondent's defense of workmen's compensation pleaded in its answer. The testimony is clear that the vessel was guilty of independent, affirmative negligence. Under the Court's instructions the jury necessarily found that the vessel had actual notice of the existence of the structure, and of its condition, and that it was negligent in failing to make it safe before turning it over for use by the stevedores in Boston. The fact that it did have notice effectively deprives it of any right to indemnity at common law. (*Schwartz* v. *Merola Bros. Const. Corp.*, 290 N. Y. 156; *Adler* v. *Tully and DiNapoli, Inc.*, 300 N. Y. 662; *Sheffield* v. *Yager*, 260 App. Div. 855, affd. 287 N. Y. 604; *Falk* v. *Crystal Hall Inc.*, 200 Misc. 979, affd. 279 App. Div. 1071; leave denied, 304 N. Y. 987.)

Further, the ship's officers admitted that it was an invariable custom at all harbors in the United States that these temporary shelters, erected by the longshoremen, be removed by the ship's crew when the ship made ready to sail, and that the failure of the ship's crew to remove the shelters constituted negligence. The longshoremen could not have anticipated the ship's failure to remove the shelters and certainly had a right to rely on the ship's discharging that duty in accordance with the custom. Even if it were a permissible inference that the longshoremen had not only erected a shelter in New York but that they had erected a defective shelter, the most that could be said is that they were joint tort feasors with the ship and so not liable for indemnity. (*Falk* v. *Crystal Hall Inc., supra.*)

In that connection it might be pointed out that there is no permissible inference from the evidence in this case that the lumber which fell and struck the plaintiff was put on top of the shelter by the longshoremen. The Court of Appeals, in the majority opinion, has held that it might be inferred from the evidence that the longshoremen at New York had erected the shelter, but that is as far as the inference could go. The lumber on top of the shelter was no part of its structure. The custom as to the erection of shelters might support the inference that the longshoremen at New York erected it, but it is not permissible to infer further from that inference that they piled the loose lumber on top. The inference that the lumber was put on top of the shelter by the ship's crew, to hold down the tarpaulin roof while the ship was encountering high winds on the way from New York to Boston, is as least as reasonable as the inference that it was put there by the longshoremen at New York. It is well established law that where evidence is susceptible of two inferences, one of which imposes liability on the defendant and the other of which exonerates him, that which exonerates him from liability must be accepted. (*Digelormo* v. *Weil,* 260 N. Y.

192, 200; *White* v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131, 135.)

So far as the vessel's claim that the stevedore was negligent in using the shelter without inspection as concerned, there is positive evidence that the shelter looked all right and that the only way in which one could determine that there was lumber on the roof would be by climbing up on something to see what was on top (67). Casual inspection could not reveal that there was lumber on top, and casual inspection is all that was required of the stevedore. On this record it must be taken as established that the ship adopted the structure as its own and presented it to the longshoremen at Boston for their use. Under those circumstances it was under a duty to make such inspections as were reasonable to insure that the structure was safe. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Gucciardi* v. *Chisholm*, 145 F. 2d 514.) Assuming that the vessel and the stevedore were alike derelict in their duty of inspection, they were at most joint tort feasors and neither was entitled to indemnity from the other for losses arising from a failure to inspect. (*Union Stockyards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217, 228.)

3. THE DECISION OF THE MAJORITY OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *Ryan Stevedoring Co.* v. *The Pan-Atlantic Steamship Co.*, 350 U. S. 124.

In the *Ryan Stevedoring* case the vessel was held entitled to indemnity because the stevedore had breached an essential term of the stevedoring contract. "It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." What relevance that decision has to the instant case is not clear. The erection of the shelter on the ship, if it entered into the contract at all, entered merely as an incidental consideration and not

as a term or provision of the contract. As in all contracts, it must be assumed that both sides, in making the agreement, took into consideration the established customs of the harbor in so far as they affected the agreement. One of those customs was that stevedores, when loading and unloading ships, erect shelters for protection against the weather, and that the ship's crew removes those shelters before the ship leaves the harbor. The ship understood that the stevedores would erect shelters, and the stevedores understood that the ship would remove them. Neither contemplated that the shelters would be left standing and certainly the stevedores could neither foresee nor anticipate any such procedure. If the ship chose to allow these flimsy temporary structures to remain standing during the voyage from New York to Boston, subjected to the hazards of heavy weather, and furnished them to the stevedores for use, knowing, as the jury has found it did know, that the structure was defective, then the ship cannot look to the stevedores for indemnity. And there is nothing in the *Ryan Stevedoring* case, nor in any other case, which would furnish support for any such contention.

4. THERE IS NO PRINCIPLE OF LAW INVOLVED HERE WHICH HAS NOT ALREADY BEEN CONSIDERED BY THIS COURT, AND FINALLY SETTLED, NOR IS THERE ANY CONFLICT IN THE HOLDINGS OF THE DIFFERENT CIRCUITS WHICH WOULD JUSTIFY THE GRANTING OF THE WRIT IN THIS CASE.

The contractual right of a ship to indemnity from a stevedoring contractor has been carefully and thoroughly considered by this Court in several recent cases, and the applicable law well settled. The only question which remains—and it does not seem to be significant in the present condition of the record—is the question whether the provisions of the Longshoremen's and Harborworker's Act furnish a complete defense to the employing stevedore where the claim to indemnity by the vessel is based solely on

principles of common law indemnity. That question was left open in the *Ryan Stevedoring* case, but its determination is not essential to the disposition of the issues in the instant case. The only dispute here concerns the significance of the facts and that dispute does not merit a review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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